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Attorneys for Defendants

PSC Industrial Outsourcing, Inc., Bruce Robinson and Joe Hamby

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LISAMARIE BRAYDEN,

Plaintiff,

vs.

PSC INDUSTRIAL OUTSOURCING,
INC., MARK BLANCHARD, JOE HANBY,
BRUCE ROBINSON and Does 1
through 1-50,

Defendants.

C07 04910

Case No.

[Removed from Monterey County
Superior Court, Case No. M85575]**NOTICE OF REMOVAL TO FEDERAL
COURT UNDER 28 U.S.C.S
1441(b) (DIVERSITY
JURISDICTION)**Complaint Filed: Aug. 1, 2007
Removal Date: Sept. , 2007
Trial Date: None SetTO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HER ATTORNEY OF
RECORD:PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. §§
1332(a)(1), 1441(a) and 1446, Defendants PSC INDUSTRIAL
OUTSOURCING, INC. ("PSC"), JOE HAMBY ("Hamby") AND BRUCE ROBINSON
("Robinson") (hereinafter collectively referred to as
"Defendants") hereby remove the above-entitled action from the
Superior Court of the State of California in and for County of

1 Monterey, to the United States District Court for the Northern
2 District of California.

3 REMOVAL JURISDICTION

4 1. Legal Framework. This Court has original jurisdiction
5 over this action under 28 U.S.C. §1332 because this action
6 involves citizens of different states and the matter in
7 controversy exceeds the sum of \$75,000, exclusive of interest
8 and costs. In support of this removal, Defendants make the
9 following showing:

10 2. Plaintiff's Complaint. On August 1, 2007, Plaintiff
11 LisaMarie Brayden ("Plaintiff") filed a Complaint in the
12 Superior Court of the State of California in the County of
13 Monterey, entitled *LisaMarie Brayden v. PSC Industrial*
14 *Outsourcing, Inc. et al.*, Case No. M 85575 ("Complaint"). A copy
15 of the Complaint is attached as **Exhibit A** to the Declaration of
16 Sharon Rossi ("Rossi Decl."). The Complaint purports to allege
17 two causes of action: (1) wrongful termination in violation of
18 public policy and Government Code section 12940 et seq. and (2)
19 sexual harassment.

20 3. Service of Complaint. Defendants received notice of
21 this lawsuit on or about August 22, 2007, when Defendant Hamby
22 was served a copy of the Summons and Complaint. Defendant PSC,
23 was also served with a copy of the Summons and Complaint on
24 August 29 , 2007. Defendant Robinson received a copy of the
25 Complaint on or about August 24, 2007. He has not been served
26 with the Complaint, but voluntarily agreed to appear in this
27 action on September 20, 2007. Plaintiff has not yet served
28 Defendant Blanchard with the Complaint.

1 4. Answer Filed in Superior Court. Defendants PSC, Hamby
2 and Robinson filed their Answer to the Complaint in the Monterey
3 County Superior Court on or about September 20, 2007. See
4 **Exhibit B** to Rossi Decl.

5 5. Removal is Timely. This Notice of Removal is filed
6 within 30 days of the first date of receipt of a copy of the
7 filed Complaint by any Defendant. Thus, removal is timely
8 pursuant to 28 U.S.C. § 1446(b) and Federal Rules of Civil
9 Procedure, Rule 6(a).

10 **DIVERSITY JURISDICTION**

11 6. Grounds for Jurisdiction. This is a civil action of
12 which this Court has original jurisdiction pursuant to 28 U.S.C.
13 § 1332(a)(1), and is one which may be removed to this Court by
14 Defendants pursuant to the provisions of 28 U.S.C. § 1441(a), in
15 that it is a civil action between citizens of different states
16 wherein the amount in controversy is in excess of the sum of
17 Seventy-Five Thousand Dollars (\$75,000.00), exclusive of
18 interest and costs.

19 7. Plaintiff's Citizenship. Defendants are informed and
20 believe that Plaintiff is, and has been at all times since the
21 commencement of this action, a citizen and resident of the State
22 of California, Stanislaus County. See DFEH Complaint attached
23 as **Exhibit A** to Rossi Decl. For diversity purposes, a person is
24 a "citizen" of the state in which he is domiciled. *Kantor v.*
25 *Wellesly Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983).
26 A party's residence is *prima facie* evidence of her domicile.
27 *State Farm Mut. Auto Ins. Co. v. Dyer*, 29 F.3d 514, 520 (10th
28 Cir. 1994).

1 8. Defendant PSC. Plaintiff names PSC as a Defendant in
2 each of her two causes of action. Complaint, ¶¶ 5-15 and 16-18.
3 PSC, was at the time of the filing of this action, incorporated
4 under the laws of the State of Delaware with its principal place
5 of business and headquarters located in Houston, Texas.
6 Pursuant to 28 U.S.C. § 1332(c)(1), "a corporation shall be
7 deemed to be a citizen of any State by which it has been
8 incorporated and of the State where it has its principal place
9 of business."

10 9. Defendant Robinson. Plaintiff names Robinson as a
11 Defendant in each of her two causes of action. Complaint, ¶¶ 5-
12 15 and 16-18. Robinson, was at the time of the filing of this
13 action, and still is domiciled in the State of Washington, and
14 is thus, a citizen of Washington. See *Kantor*, 704 F.2d at 1090.

15 10. Defendant Blanchard. Plaintiff names Blanchard as a
16 Defendant in each of her two causes of action. Blanchard is
17 Plaintiff's former supervisor. Blanchard, was at the time of
18 the filing of this action, and still is domiciled in the State
19 of Louisiana, and is thus, a citizen of Louisiana. See *id*.

20 11. Defendant Hamby. Although Plaintiff only references
21 Hamby in one line of her Complaint (*i.e.*, ¶ 3, line 26),
22 Plaintiff also names Hamby as a Defendant in each of her two
23 causes of action. Complaint, ¶¶ 5-15 and 16-18. Hamby is the
24 site manager of the PSC San Ardo facility, where Plaintiff
25 worked. Hamby, was at the time of the filing of this action,
26 and still is domiciled in California, and is thus, a citizen of
27 California. See *Kantor*, 704 F.2d at 1090.

28

1 12. Joinder of Hamby is Fraudulent. For the reasons
2 explained in paragraphs 13-15 below, Hamby is not properly named
3 as party because Plaintiff cannot establish liability against
4 him. A defendant, who has been fraudulently joined, such as
5 Hamby, must be disregarded for removal purposes. *McCabe v.*
6 *General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)
7 (holding that discharged employee failed to state cause of
8 action against individual supervisors, under California law, and
9 thus their joinder as defendants was sham and their presence did
10 not destroy diversity); see also *Lewis v. Time, Inc.*, 83 F.R.D.
11 455, 460 (E.D. Cal. 1979), *aff'd*, 710 F. 2d 549 (9th Cir. 1983)
12 (court may disregard joinder and retain jurisdiction where
13 joinder of non-diverse defendant is only a fraudulent device to
14 prevent removal).

15 13. Plaintiff's Claims Against Hamby are Not Actionable.
16 The causes of action against Defendant Hamby are (1) wrongful
17 termination in violation of public policy and Government Code
18 section 12940 et seq. and (2) sexual harassment. None of these
19 claims are actionable as to this individual Defendant.

20 14. Wrongful Termination Claims are Not Actionable Against
21 Supervisors. "[I]n California it is well established that,
22 '[a]s a matter of law, only an employer can be liable for the
23 tort of wrongful discharge in violation of public policy.'" *Beck*
24 *v. FedEx Ground*, 2007 WL 2028581, *3) (E.D.Cal.2007) (quoting
25 *Khajavi v. Feather River Anesthesia Med. Group*, 84 Cal.App.4th
26 32, 53 (2003)). Because Plaintiff was employed exclusively by
27 PSC, none of the individual Defendants, including Hamby, can be
28 held liable as to the second cause of action. Thus, as a matter

1 of law, Plaintiff first cause of action against Hamby is wholly
2 without merit. As such, Plaintiff has fraudulently joined Hamby
3 as a Defendant in her first cause of action. *McCabe*, 811 F.2d at
4 1339 (providing, "If the plaintiff fails to state a cause of
5 action against a [] defendant, and the failure is obvious
6 according to the settled rules of the state, the joinder of the
7 [] defendant is fraudulent.")

8 15. Plaintiff's Sexual Harassment Claim Against Hamby is
9 Wholly Devoid of Merit. Equally spurious is the second cause of
10 action against Hamby, for sexual harassment. Plaintiff alleges
11 that Blanchard sexual harassed her by, *inter alia* "assaulting
12 her on two occasions by pulling out her top and peering down at
13 her breasts, and by grabbing her forcefully by the buttocks."
14 Complaint, ¶ 7. Plaintiff, however, does not make any specific
15 allegations against Hamby in regards to this cause of action. In
16 fact, in her Complaint, Plaintiff makes only one reference to
17 Hamby as follows: "Defendant Joe Hanby, [sic.] at all times
18 relevant hereto, was the Site manager at the same facility."
19 Complaint, ¶ 3. There are no other factual allegations as to
20 Hamby to even remotely suggest that he ever engaged in any
21 sexually harassing conduct toward Plaintiff, or engaged in any
22 alleged inappropriate conduct whatsoever. Instead, she simply
23 concludes that "Defendants and each of them and/or their
24 agents/employees sexually harassed plaintiff and/or failed to
25 take immediate and appropriate and appropriate corrective
26 action." Complaint, ¶17. This is insufficient to state a cause
27 of action against Hamby. Supervisors cannot be vicariously
28 liable acts of the subordinates. See CIV. CODE § 2351 ("agent is

1 not responsible to third persons for the acts of the sub-
2 agent"). Furthermore, supervisory employees cannot be held
3 liable for failing to take action to prevent the sexual
4 harassment of a subordinate employee. *Fiol v. Doellstedt*, 50
5 Cal.App.4th 1318, 1326 (1996) (stating "a supervisory employee
6 owes no duty to his or her subordinate employee to prevent
7 sexual harassment in the workplace. That is a duty owed only by
8 the employer. . . We conclude a supervisory employee is not
9 personally liable under the FEHA as an aider and abettor of
10 harassment for failing to prevent the sexual harassment of a
11 subordinate employee") (internal citations omitted). Thus,
12 Plaintiff has fraudulently joined Defendant in her second cause
13 of action as well. See *McCabe*, 811 F.2d at 1339.

14 16. Doe Defendants. The presence of Doe defendants in this
15 case has no bearing on diversity with respect to removal. "For
16 purposes of removal under this chapter, the citizenship of
17 defendants sued under fictitious names shall be disregarded."
18 28 U.S.C. § 1441(a).

19 17. The Amount In Controversy Exceeds the Jurisdictional
20 Limit. The amount in controversy in this action, exclusive of
21 interest and costs, exceeds the sum of Seventy-Five Thousand
22 Dollars (\$75,000).¹ In the Complaint, Plaintiff alleges that she
23 has suffered and continues to suffer damages, including
24 "embarrassment, humiliation, fear for her safety, emotional
25 distress, loss of past and future earnings and earning capacity,

26 ¹ Notably, Plaintiff's failure to specify the amount of damages sought in the Complaint does not
27 deprive this Court of jurisdiction. See *White v. J.C. Penny Life Ins. Co.*, 861 F. Supp. 25, 26
28 (S.D. W. Va. 1994) (defendant may remove suit to federal court notwithstanding plaintiff's
failure to plead a specific dollar amount in controversy; if rules were otherwise, "any plaintiff
could avoid removal simply by declining ... to place a specific dollar value on its claim").

1 employment benefits, medical and other special damages according
2 to proof." Complaint, ¶¶ 13 and 18. Additionally, Plaintiff
3 prays for punitive damages. Complaint, ¶ 15 and pg. 5, line 7.
4 Requests for punitive damages must be taken into account in
5 ascertaining the amount in controversy. *Davenport v. Mutual*
6 *Benefit Health and Accident Assn.*, 325 F.2d 785, 787 (9th Cir.
7 1963). Finally, Plaintiff prays for attorneys' fees and costs.
8 Complaint, pg. 5, line 6. If attorneys' fees are recoverable by
9 statute or contract, then the fees claim is included in
10 determining the amount in controversy. *Goldberg v. CPC Int'l,*
11 *Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982), *cert. denied*, 459
12 U.S. 945 (1982).

13 In determining whether a complaint meets the amount in
14 controversy threshold of 28 U.S.C. § 1332(a), a court should
15 consider the aggregate value of claims for compensatory and
16 punitive damages. *See, e.g., Bell v. Preferred Life Assurance*
17 *Soc'y*, 320 U.S. 238, 241 (1943) (amount in controversy
18 requirement met if plaintiff "might recover" award of
19 compensatory and punitive damages in excess of amount in
20 controversy requirement). Accordingly, Plaintiff's alleged
21 economic, compensatory, and punitive damages bring the total
22 amount in controversy to a sum exceeding \$75,000. The amount in
23 controversy requirement is satisfied because it is "more likely
24 than not" that the amount in controversy exceeds the
25 jurisdictional minimum. *Sanchez v. Monumental Life Ins. Co.*,
26 102 F.3d 398, 404 (9th Cir. 1996).

27 18. This Court Possess Original Jurisdiction. Under 28
28 U.S.C. § 1332(a)(3), this Court possesses original jurisdiction

1 over this action because it involves an amount in controversy in
2 excess of \$75,000 and is between citizens of different states.
3 Consequently, the case is properly removed to this Court
4 pursuant to the provisions of 28 U.S.C. § 1441.

5 VENUE

6 19. Venue lies in the Northern District of California.
7 This action was originally brought in the Superior Court of the
8 State of California, County of Monterey. All of the alleged
9 wrongful conduct which Plaintiff complains of took place in San
10 Ardo, California, which is located in Monterey County.
11 Complaint, ¶ 1. A civil action founded on diversity
12 jurisdiction may be venued in a judicial district in which a
13 substantial part of the events or omissions giving rise to the
14 wrongful conduct occurred. 28 U.S.C. § 1391(a). Monterey County
15 is part of the Northern District of California. 28 U.S.C. §
16 84(a). Accordingly, venue is proper.

17 NOTICE TO PLAINTIFF AND STATE COURT

18 16. Compliance with 28 U.S.C. § 1446(d). Pursuant to 28
19 U.S.C. § 1446(d), Defendants, concurrently with filing this
20 Notice of Removal, is filing a Notice of Removal with the Clerk
21 of the Superior Court for the County of Monterey. In addition,
22 Defendants are serving Plaintiff's Counsel with a copy of the
23 Notice of Removal. See **Exhibits C** to Rossi Decl.

24 WHEREFORE, Defendants pray that the above action now
25 pending before the Superior Court of the State of California for
26 the County of Monterey be removed to this Court.

1 DATED: September 21, 2007

SEYFARTH SHAW LLP

By 

Sharon Ongerth Rossi
Attorneys for Defendants
PSC INDUSTRIAL OUTSOURCING,
INC., BRUCE ROBINSON AND JOE
HAMBY